Allied Eastern States Maintenance Corporation, a wholly-owned subsidiary of Allied Maintenance Corporation and Elva E. Silay. Case 6-CA-13704

May 28, 1982

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On July 27, 1981, Administrative Law Judge James P. Timony issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, ¹ and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Based on the credited testimony, the Administrative Law Judge found, and we agree, that the Respondent did not unlawfully discharge Elva Silay. Although finding that she had on occasion advised other employees of their "union rights," and that her conduct in this respect was a "motivating factor" leading to her subsequent discharge, the Administrative Law Judge concluded that, even in the absence of such protected activity, Silay would have been terminated for the other, permissible reasons cited in the disciplinary letter she received prior to her discharge.

However, the Administrative Law Judge failed to conclude that the Respondent violated Section 8(a)(1) of the Act by its reference in the aforesaid letter to that activity which is clearly protected, and indeed so found by the Administrative Law Judge; namely advising other employees "as to their union rights." To the extent that the Re-

spondent mentioned, and thereby sought to discourage, such activity, it infringed on the rights guaranteed to all employees by Section 7, thus violating Section 8(a)(1) of the Act.

Accordingly, we shall remedy the violation herein found by requiring the Respondent to expunge from its June 25, 1980, disciplinary letter to Silay, and from any other records maintained by the Respondent with respect to Silay, all references to the latter's protected activities, including the giving of advice to employees concerning their union or statutory rights. We shall also require the posting of an appropriate notice.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Allied Eastern States Maintenance Corporation, a wholly-owned subsidiary of Allied Maintenance Corporation, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Citing Elva Silay for giving advice to employees concerning their union or statutory rights.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act
- 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:
- (a) Expunge from its June 25, 1980, disciplinary letter to Elva E. Silay and from any other records maintained by it, with respect to Silay, all references to the latter's protected activities, including the giving of advice to employees concerning their union or statutory rights.
- (b) Post at appropriate locations copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The record does not support the Administrative Law Judge's finding that Elva Silay was inconsistent insofar as she testified both in justification for parking her car at a proscribed location while at work and, later, to the necessity for leaving work early to obtain a ride home with a friend, as she had indeed used both modes of transportation in traveling to and from work. However, in light of the other inconsistencies in Silay's testimony, which were noted by the Administrative Law Judge, we find no basis for disturbing his resolutions concerning her credibility.

² We deem such a remedy appropriate both because the Respondent subsequently rehired Silay, who was concededly a competent employee, and presumably maintains current records concerning her employment, and because the statutory rights of other employees were likewise violated by the Respondent's unlawful conduct.

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Reasonable steps shall be taken by the Respondent to ensure that copies of said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not expressly found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT cite Elva E. Silay for giving advice to employees concerning their union or statutory rights.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL expunge from our June 25, 1980, disciplinary letter to Elva E. Silay, and from all records maintained by us, with respect to Ms. Silay, all references to her protected activities, including the giving of advice to employees concerning their union or statutory rights.

ALLIED EASTERN STATES MAINTE-NANCE CORPORATION, A WHOLLY-OWNED SUBSIDIARY OF ALLIED MAINTENANCE CORPORATION

DECISION

STATEMENT OF THE CASE

JAMES P. TIMONY, Administrative Law Judge: This case was heard in Pittsburgh, Pennsylvania, on May 8, 1981, upon the complaint issued on September 30, 1980, based on a charge filed by Elva E. Silay. The complaint, as amended, charges that Allied Eastern States Maintenance Corporation, a wholly- owned subsidiary of Allied Maintenance Corporation, engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by issuing a disciplinary letter on June 25, 1980, to its employee, Silay, because Silay advised other employees of their rights under the union contract, and by terminating the em-

ployment of Silay on July 21, 1980, because of her union activities.

By its answer, and by stipulation, Allied admits or does not contest service of the charge, commerce facts and conclusions, the labor organization status of Service Employees' International Union, Local 29, AFL-CIO, and the supervisory status of Keith Brown, area manager of Allied, and Bernard McGivern, foreman. Allied denies the commission of the unfair labor practices alleged in the complaint and argues that Silay was terminated for reasons other than for the exercise of her rights guaranteed in Section 7 of the Act.

Issues

- 1. Whether Allied violated the Act by issuing Silay a disciplinary warning letter because she advised other employees of their rights under the union contract.
- 2. Whether Allied violated the Act by terminating the employment of Silay because she advised other employees of their rights under the union contract.

Upon consideration of the whole record, and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Allied admits and I find that: (1) It is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and (2) the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE EVENTS

Allied is a janitorial cleaning contractor with 600 employees servicing 35 buildings in Pittsburgh. Since March 1978, Allied has performed janitorial services in the U.S. Steel Building located at 600 Grant Street, one of the largest office buildings in the world, where the events in this case took place. Allied's services at the building are overseen by the building's manager, John W. Galbreath Company, a competitor of Allied, which had been responsible for the cleaning operation until Allied won the contract.

Silay was employed by Allied from March 1978 until July 21, 1980. Prior to that time she was employed for 7-1/2 years by Galbreath as a night cleaner. Starting in March 1978, Silay was employed by Allied as a clerk-typist in a nonunion salaried position at or about the same pay received by the union cleaning personnel. She was the only Allied clerk-typist in the building and did general office work, including typing, posting the payroll from the sign-in sheet, making time reports, and answering the telephone. Silay worked under several supervisors, including Keith Brown, area manager, and Edward White, director of night operations, and shared an office with three supervisors, including her direct supervisor, Bernard McGivern.

Although Silay competently did her assigned work, her supervisors testified that they were irritated by her opinionated statements and officious manner and by the assumption of authority not commensurate with her

duties and responsibilities as a clerk-typist. This friction culminated in the Andracki incident.

Florence Andracki and Silay were old friends, having worked together for many years at Galbreath as chairwomen prior to being employed by Allied. In June 1980 Andracki was told by her supervisor, McGivern, that her work in cleaning the steps in the U.S. Steel Building was unsatisfactory. She had bid on the job and had been cleaning the stairs for a long time. Allied had received a letter from Galbreath complaining about the steps being dirty and McGivern wanted the steps cleaner. Andracki, McGivern, and a union shop steward, Bill Mitchell, discussed the matter in McGivern's office. Andracki said she did not have the right equipment to clean the steps. McGivern told her to use a mop. She said the mops were too big. He told her to scrub the steps with a wet rag or sponge. She said she would rather use a wet mop. Silay interjected her opinion that McGivern should not tell Andracki to hand wash the stairs and that the work was formerly done by two men. Silay said that Andracki ought to meet with Brown about the incident.

A meeting on this matter was held on June 18, 1980, in an inner office adjoining the office occupied by McGivern and Silay. Present were Brown, McGivern, Andracki, Mitchell, and the union business agent, Ralph Terry. The meeting lasted about 15 minutes and concluded with White telling Andracki that he did not care how she cleaned the steps as long as they were clean. Brown thought the meeting was a waste of time, and asked Mitchell what caused him to call the meeting. Mitchell indicated that Elva Silay caused him to call the meeting.

Waiting outside the inner office were a union steward and a young man named Mark DeChantel. While the meeting was going on, Silay interrogated DeChantel in a brusque manner. She asked who he was and the purpose of his visit. He told her that he was an Allied supervisor recently transferred from New York. She asked how long he had been a supervisor. He said 6 years. She said that he was lucky he had lasted that long since most of them lasted only 2 years. She then asked if he were going to replace Brown.

The next day, Brown called Silay down to his office and, when she walked in and sat down, Brown said, "I've had it up to here with you. Do you think you're some kind of queen up there?" She asked what he meant. He told her that he was upset about her conversation with DeChantel who had recently become one of Brown's subordinates. He also indicated that she had caused the unnecessary Andracki meeting, inconveniencing himself and the union business agent. Brown recounted a series of complaints he had involving her department and told her he knew she was looking for another job and was going on vacation in a couple of weeks and that he would not be disappointed if she did not come back.

On June 25, 1980, Brown wrote a letter to Silay detailing his complaints about her conduct as follows:

1. You were abusing your lunch period by taking extended lunch periods longer than 1/2 hour and at times other than from 12:00 to 12:30.

- 2. You allowed non-Allied employees to eat lunch at one of our supervisors' desk.
- 3. You were constantly advising certain employees as to their conduct in the performance of their jobs, which is not part of your responsibility.
- 4. You have been continually discussing Allied matters with other parties after being warned repeatedly about such discussions.
- 5. You have informed your superior that you are attempting to secure employement [sic] with other employers.
- 6. On various occasions you have advised Allied employees as to their union rights. These matters are totally out of your domain.
- 7. You have requested certain privileges from others, thus by-passing your supervisor; i.e., parking your car in the loading dock.
- 8. On many occasions you have made remarks that Allied shows favoritism towards minority employees and supervisors in the Building.
- 9. You were making a practice of leaving your work assignment at 4:15 p.m. and not 4:30 p.m., your assigned quitting time.

After Silay went on vacation, a relief employee took her place, and Brown testified that things went so smoothly that he conferred with White and McGivern and made the decision to discharge Silay. When Silay returned from vacation, McGivern told her that her employment was terminated for the reasons outlined in the June 25, 1980, letter.²

One of the reasons that Allied discharged Silay and warned her by the June 25, 1980, letter was because of her participation in the Andracki incident.³ Paragraph 6 of the June 25, 1980, letter states that: "On various occasions you have advised Allied employees as to their union rights. These matters are totally out of your domain." Brown testified that by this language he meant to describe Silay's tendency to tell employees of their vacation and holiday benefits under the union contract, which she sometimes scheduled rather than waiting for the supervisors to do it.4 In a pretrial affidavit,5 Brown stated, however, that this language was also directed at Silay's participation in the Andracki step-cleaning incident. Silay's concern for her fellow employees was protected activity under the Act and it was a motivating factor in the Employer's decision to warn and discharge her. This finding shifts the burden to the Employer to demonstrate that the same action would have taken place

¹ DeChantel described this conversation as the "third degree."

² Silay was rehired by Allied in October 1980, after the charges in this case were filed. I believe that it would set an unfortunate precedent to rely on this fact as proof of respondent's lack of justification for discharging her. In *General Cinema Corp.*, 228 NLRB 377, fn. 4 (1977), the Board held discharges were unlawful but did not adopt the finding that subsequent rehiring was conclusive proof of the employer's unlawful motivation.

³ Earlier Silay had told Brown that she disapproved of the termination of another friend of hers named Dorothy Davis for absenteeism, and he also had this incident in mind when he wrote the letter and discharged her.

⁴ Silay did not rebut this complaint.

⁵ This affidavit was admitted in evidence. Snaider Syrup Corporation and Tulip Syrup Corporation, 220 NLRB 238, 244-245 (1975)

even in the absence of the protected conduct. Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980).

White, Brown, and McGivern testified about Silay's infractions.⁶ For 6 months prior to her dismissal, she had on numerous occasions taken, without permission, lunch hours longer and at different times than allowed by company policy. She also left early without permission on several occasions. She allowed her son and niece to eat lunch several times at the desk of one the supervisors. She received permission to park her car on the loading dock by misrepresenting to the guard that she had to park there because she needed her car for business trips. She constantly complained that she was underpaid and did not receive sufficient time off; she refused to do some clerical tasks; and she told her supervisor that she had filed a job application with John W. Galbreath Company. She often alleged that Allied showed favoritism toward minority employees. Despite being instructed repeatedly not to discuss Allied affairs with anyone other than her supervisors,7 on several occasions she exacerbated complaints from customers or representatives of John W. Galbreath Company that wastebaskets were not emptied, or some other service was not provided, by telling them that the cleaning personnel had too much to do or by giving some other inappropriate reason. Brown also suspected that Silay was disclosing information that she learned from the personnel files and from listening to the managers in her office. He felt that she was "leaking" this information to an employee who had been discharged and was suing the Company, to union strikers, and to the J. W. Galbreath Company.

Brown's central complaint involved Silay's tendency to take charge. Silay constantly told employees how and where to do their jobs, and when they could take time off from work, 10 without consulting the supervisors. This caused confusion among the cleaning personnel when her instructions differed from those of the supervisors. Brown and White warned her about this. White told her: "[L]ook, Elva, you're not a supervisor, please do not instruct the employees on how to do their job and what to do, that's not your job I told you a number of times, would you please quit doing that."

Silay's concern for some of her fellow employees¹² was not the central impetus for the meeting of June 19, the letter of June 25, nor the discharge, all of which evolved, I believe, from a long history of irritation at Silay's conduct culminating in her remarks to DeChantel, which Brown inferred to mean that she thought he should or was about to be replaced. Further, I have no doubt that even without Silay's participation in the Andracki incident Brown would have discharged her for other causes outlined in the June 25 letter. I therefore find that by the preponderance of the evidence Allied has met the burden of demonstrating that Silay would have been discharged even in the absence of the protected conduct, and that the complaint should be dimissed.

[Recommended Order omitted from publication.]

⁶ I credit this testimony. The reasons given by each of the supervisors for Silay's discharge were consistent. There was no shifting of justification and it was not pretextual. McGivern now works for another company and, by his demeanor, was an especially believable witness. Silay also testified but did not appear as believable. She was also inconsistent. At one point in her testimony she said, in response to the complaint that she parked on the loading dock, that she had been parking there ever since she took the job as a clerk-typists. She later asserted, however, in response to the complaint that she made it a practice of leaving 15 minutes early, that she could get a ride home if she left early apparently not recognizing the inconsistency on the record as to how she got home. She also testified that she had no discussions of any kind with Brown about her job performance. Later she admitted that she did.

⁷ Silay admits that Brown warned her in 1979 not to disclose Allied affairs to anyone else. Counsel for the General Counsel argues that Silay was not "disciplined" for the various indiscretions and argues that Allied therefore condoned them, but I believe the supervisors' testimony that she was warned on numerous occasions and that such warnings were the usual way of disciplining management employees like Silay.

Bilay refused to be supervised by McGivern alone. Her assertive nature was indicated when she testified that, although she was told when she was hired that her lunch hour would be from 12 to 12:30, when again instructed by her immediate supervisor, McGivern, to lunch only at that time, her response was: "Who says that?" She also refused to do simple tasks such as mathematical computations until told to do so by Brown and White, as well as by McGivern.

⁹ Silay admitted she advised cleaning employees how to do their jobs.

¹⁰ Silay did not rebut this complaint.

¹¹ The employees apparently felt that Silay spoke for management because she worked in the company office and because she recorded their time and attendance records.

¹² In addition to her racial generalities, Silay's opinions of the union and other employees were not always sympathetic or charitable. She thought a strike called by the union was "foolish." She advised McGivern on numerous occasions to fire a union steward, Bill Mitchell, falsely alleging that he was drinking in taverns and visiting a girl friend during working hours.